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where the interests of the parent and child in the underlying suit are in conflict and where the minor is seeking to vindicate her right to privacy. This narrow reading is called for by the court's holding that a contrary procedural rule would destroy a minor plaintiff's right to privacy before she had a chance to establish it.

C. GEORGENNE PARKER

EVIDENCE—APPLICATION OF RULE AGAINST IMPEACHMENT OF ONE'S OWN WITNESS TO DEPOSITION USED AT TRIAL

*Zabol v. Lasky*¹

Paul Zabol, a real estate broker, was hired by Manuel Lasky to aid in the leasing of space in an office building owned by Lasky. One of the contacts made by Zabol was Howard E. Ridgeway, a representative of the Seven-Up Company. Negotiations were held between Lasky, Zabol, and Ridgeway, during which no agreement was reached. Several months after these negotiations ceased, Seven-Up, acting through another real estate agent, contracted with Lasky for the purchase of the office building. When Zabol learned of the sale, he filed an action in quantum meruit to recover a broker's commission for services rendered in connection with the sale.

An element necessary to Zabol's recovery was proof that he was the procuring or efficient cause of the sale. In an effort to meet this burden, Zabol introduced the deposition of Ridgeway, who had since died. It was Zabol's hope that in introducing the deposition he would be able to establish from the facts and circumstances surrounding the negotiations that there had been only a lag in the negotiations and that the sale of the office building had been the direct result of his prior efforts. Contained in the deposition, however, was a direct statement by Ridgeway to the effect that the sale had in no way resulted from the efforts of Zabol.

The primary question presented was whether the court should allow the plaintiff's case to go to the jury, if doing so would require the jury to disbelieve direct testimony contained in a deposition introduced into evidence by the plaintiff, where that testimony was the only direct evidence presented on the issue. The circuit court allowed the case to go to the jury and entered judgment for the plaintiff Zabol on a jury verdict in

his favor. The Supreme Court of Missouri reversed, ruling that the circuit court should have directed a verdict for Lasky. The court held that the plaintiff "was bound by this uncontradicted testimony of his own witness, and he was not entitled to have the jury disregard his only direct evidence on this question and find the facts contrary to such evidence."²

This statement that a party is "bound by" the testimony of his own witnesses is ambiguous. In the context of the *Zabol* case, two possible meanings of such language present themselves. The court may only have been ruling on the sufficiency of the evidence presented by the plaintiff Zabol to get to the jury on the issue of the procuring cause of the sale. On the other hand, the court may have meant to say that Zabol's evidence concerning the circumstances surrounding the negotiations was not admissible because of the rule against impeachment of one's own witness, and therefore, given the direct statement made in the deposition, that Zabol had failed to make out a submissible case for the jury. If so, the *Zabol* decision may be an indication that courts in Missouri will enforce the rule against impeachment of one's own witness more strictly in the case of a deposition than in the case of a live witness on the stand.

The rule that a party bearing the burden of proof on an issue is bound by the uncontradicted testimony of his own witness is a corollary of the rule against direct impeachment of one's own witness. It is said that there are five main lines of attack upon the credibility of a witness by direct impeachment: by proof that the witness on a previous occasion has made statements inconsistent with his present testimony; by showing bias on the part of the witness; by direct attack on the moral character of the witness; by showing a defect in the witness' capacity to observe, remember, or recount the matters in his testimony; or by proof by other witnesses that material facts are otherwise than as related by the witness under attack.³

Under the general rule against impeachment of one's own witness in Missouri, the calling party is precluded from impeaching his own witness through any of the above lines of attack except the last, *i. e.*, by direct contradiction of the witness by the testimony of other witnesses.⁴ Except in cases which qualify under the two narrow exceptions recognized by the

2. *Id.* at 305.

3. C. MCCORMICK, EVIDENCE § 33 (2d ed. 1972).

4. *Brown v. Wood*, 19 Mo. 475, 476 (1854). The court held that although a party cannot impeach his own witness because his testimony fails to establish a fact, "the party is not precluded from proving the fact by another witness, although, in so doing, he may show the first witness guilty of perjury." *Accord*, *Frank v. Wabash R.R.*, 295 S.W.2d 16, 22 (Mo. 1956) (the plaintiff is not bound by the defendant's testimony unless it is the only evidence on a particular point); *Draper v. Louisville & N.R.R.*, 348 Mo. 886, 898, 156 S.W.2d 626, 633 (1941) ("If A put B on the stand and prove by him a certain state of facts, this does not preclude A from putting C, D, or E on the stand and proving a different state of facts."); *Smith v. Millers Mut. Fire Ins. Co.*, 320 Mo. 146, 168, 6 S.W.2d 920, 928 (En Banc 1928) (a party is not absolutely bound by a witness' testimony);

Missouri courts,⁵ if a party bearing the burden of proof on a material issue fails to adduce evidence competent to contradict the direct testimony of his only witness on that issue, he cannot otherwise impeach that witness.⁶ It follows from the operation of this rule that the calling party can be said to be "bound by" this uncontradicted testimony; the calling party will be precluded from asking the jury to disbelieve the uncontradicted testimony of his own witness.⁷ Consequently, if direct testimony of the witness is the only competent evidence on that issue, and if that evidence is adverse to the calling party, there is a failure to make a submissible case on that issue.⁸

Under the traditional rule against impeachment of one's own witness, a party will not be permitted to impeach a witness whom he has called to the stand.⁹ This rule originated in primitive trial procedures in which the sole function of the witness was to swear to the veracity of the calling party.¹⁰ In such a proceeding, the party could choose anyone he pleased to be a witness or "oathhelper,"¹¹ and it became established that the party guaranteed the credibility of that witness and was bound by his testimony.¹²

The nature of judicial proceedings has changed considerably since the adoption of this rule against direct impeachment of one's own witness, but the rule persists. The courts cite three main reasons for its retention. First, because a party is free to choose whom he will call as his witness, it is not unjust that he should stand or fall by what that witness says.¹³ As a prac-

Rodan v. St. Louis Transit Co., 207 Mo. 392, 408, 105 S.W. 1061, 1066 (1907); Imhoff v. McArthur, 146 Mo. 371, 377, 48 S.W. 456, 457 (1898) (a party is not bound by a witness' testimony, even if he calls the other party).

5. These two exceptions to the rule against impeachment of one's own witness are if the calling party has been "entrapped" into calling the witness, see text accompanying notes 20-27 *infra*, or if the party calls the adverse party as a witness, see text accompanying notes 28 and 29 *infra*.

6. See, e.g., Humes v. Salerno, 351 S.W.2d 749 (Mo. 1961); State v. Castino, 264 S.W.2d 372 (Mo. 1954); Crabtree v. Kurn, 351 Mo. 628, 173 S.W.2d 851 (1943); State v. Gregory, 339 Mo. 133, 96 S.W.2d 47 (1936); Pulitzer v. Chapman, 337 Mo. 298, 85 S.W.2d 400 (En Banc 1935); State v. Drummins, 274 Mo. 632, 204 S.W. 271 (1918); Dunn v. Dunnaker, 87 Mo. 597 (1885); Brown v. Wood, 19 Mo. 475 (1854).

7. See Draper v. Louisville & N.R.R., 348 Mo. 886, 898, 156 S.W.2d 626, 633 (1941); Rodan v. St. Louis Transit Co., 207 Mo. 392, 408, 105 S.W. 1061, 1066 (1907).

8. See Draper v. Louisville & N.R.R., 348 Mo. 886, 899, 156 S.W.2d 626, 634 (1941) ("This is not so much a matter of being bound by what his witness says as it is a failure of proof of an essential fact").

9. See generally cases cited note 6 *supra*; Wallace, *Direct Impeachment of an Adverse Party*, 35 MO. L. REV. 271, 272-74 (1970).

10. 3A J. WIGMORE, EVIDENCE § 896 (Chadbourn rev. 1970).

11. *Id.*

12. See also Thomas, *The Rule Against Impeaching One's Own Witness: A Reconsideration*, 31 MO. L. REV. 364 (1966).

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13. 3A J. WIGMORE, *supra* note 10, § 897.

tical matter, this freedom of choice rarely exists in modern trials, and Missouri courts have long since rejected this rationale.¹⁴ Second, by bringing the witness before the court, the party is representing to the court and to the jury that the witness is worthy of belief, and hence the party guarantees or vouches for the witness' general credibility.¹⁵ This seems to be in direct conflict with the general rule which allows the calling party to introduce extrinsic evidence to contradict the testimony of his own witness.¹⁶ In spite of this, courts in Missouri have frequently recited this rationale as the controlling reason for not allowing direct impeachment of one's own witness.¹⁷ Third, this rule is seen as preventing the proponent from having the means to coerce favorable testimony from his own witness.¹⁸ This has been cited as the actual reason for the continued acceptance of the rule against impeachment of one's own witness, particularly in those Missouri cases which purport to reject the theory that a party vouches for the credibility of the witnesses he calls to the witness stand.¹⁹

The courts in Missouri have recognized two exceptions to the rule against direct impeachment of one's own witness in addition to direct contradiction of the witness' testimony by other evidence. The first exception involves the situation in which a party can prove that he was "entrapped" into calling a witness who then testified adversely to the interests of that party.²⁰ In such a case, the calling party is entitled to impeach the witness by showing any prior inconsistent statements made by the witness concerning the facts contained in the witness' present testimony.²¹ However, two conditions must be met before impeachment will be allowed under this exception. First, the party must show actual and reasonable surprise at the

14. See generally cases cited note 4 *supra*.

15. 3A J. WIGMORE, *supra* note 10, § 898.

16. For cases allowing contradictory evidence, see generally cases cited note 4 *supra*.

17. Talley v. Bowen Constr. Co., 340 S.W.2d 701, 706 (Mo. 1960); State v. Castino, 264 S.W.2d 372, 375 (Mo. 1954); Mooney v. Terminal Ry. Ass'n, 352 Mo. 245, 260, 176 S.W.2d 605, 611 (1944); Pulitzer v. Chapman, 337 Mo. 298, 318, 85 S.W.2d 400, 411 (En Banc 1935); Gallagher v. S.Z. Schutte Lumber Co., 273 S.W. 213, 221 (K.C. Mo. App. 1925); Luzzadder v. McCall, 198 S.W. 1144, 1145 (K.C. Mo. App. 1917). But see State v. Kline, 372 S.W.2d 62, 67 (Mo. 1963); Crabtree v. Kurn, 351 Mo. 628, 646-47, 173 S.W.2d 851, 858-59 (1943).

18. 3A J. WIGMORE, *supra* note 10, § 899. See also State v. Kline, 372 S.W.2d 62, 67 (Mo. 1963); Crabtree v. Kurn, 351 Mo. 628, 646-47, 173 S.W.2d 851, 858-59 (1943).

19. State v. Kline, 372 S.W.2d 62, 67 (Mo. 1963); Crabtree v. Kurn, 351 Mo. 628, 646-47, 173 S.W.2d 851, 858-59 (1943). These cases cite preventing coercion of favorable testimony from one's own witness as the true reason for the rule. They seem to reject by implication the theory that the calling party vouches for the credibility of his witness.

20. Dunn v. Dunnaker, 87 Mo. 597, 600 (1885).

testimony of the witness.²² Something more than a mere showing that the testimony was unexpected is required.²³ The party must establish to the court's satisfaction not only that the testimony came without reasonable warning,²⁴ but also that the witness actually led the proponent to believe that the testimony would be otherwise than it actually was.²⁵ Second, the party must establish that he was affirmatively damaged by the testimony of his witness.²⁶ The mere fact that the witness fails to testify favorably for the calling party is not sufficient to allow the calling party to impeach him. Before the calling party can impeach, the witness by his testimony must become, in effect, a witness for the adverse party.²⁷

The other general exception recognized in Missouri arises if one calls an adverse party as his own witness.²⁸ In such a situation the calling party is allowed to impeach his own witness anytime by showing any prior inconsistent statements made by that witness concerning the facts contained in the witness' present testimony.²⁹

The trend in Missouri has been to liberalize application of the rule against impeachment of one's own witness. Whether the calling party has established surprise and affirmative damage so as to come under the "en-

22. *State v. Castino*, 264 S.W.2d 372, 375 (Mo. 1954); *Malone v. Gardner*, 362 Mo. 569, 582, 242 S.W.2d 516, 523 (En Banc 1951); *Crabtree v. Kurn*, 351 Mo. 628, 647-48, 173 S.W.2d 851, 859 (1943); *State v. Drummins*, 274 Mo. 632, 647, 204 S.W. 271, 276 (1918); *Woelfle v. Connecticut Mut. Life Ins. Co.*, 234 Mo. App. 135, 147, 112 S.W.2d 865, 872 (St. L. 1938); *Dauber v. Josephson*, 209 Mo. App. 531, 542, 237 S.W. 149, 153 (K.C. 1922).

23. See generally cases cited note 22 *supra*. See also *Thomas*, *supra* note 12, at 369.

24. *Malone v. Gardner*, 362 Mo. 569, 582, 242 S.W.2d 516, 523 (En Banc 1951); *Crabtree v. Kurn*, 351 Mo. 628, 648, 173 S.W.2d 851, 859 (1943); *Woelfle v. Connecticut Mut. Life Ins. Co.*, 234 Mo. App. 135, 147-48, 112 S.W.2d 865, 872 (St. L. 1938); *Luzzadder v. McCall*, 198 S.W. 1144, 1145 (K.C. Mo. App. 1917).

25. *Malone v. Gardner*, 362 Mo. 569, 582, 242 S.W.2d 516, 523 (En Banc 1951); *Crabtree v. Kurn*, 351 Mo. 628, 648, 173 S.W.2d 851, 859 (1943); *Dunn v. Dunnaker*, 87 Mo. 597, 600 (1885); *Woelfle v. Connecticut Mut. Life Ins. Co.*, 234 Mo. App. 135, 147-48, 112 S.W.2d 865, 872 (St. L. 1938); *Dauber v. Josephson*, 209 Mo. App. 531, 542, 237 S.W. 149, 153 (K.C. 1922); *Luzzadder v. McCall*, 198 S.W. 1144, 1145 (K.C. Mo. App. 1917); *Spurgin Grocer Co. v. Frick*, 73 Mo. App. 128, 133 (K.C. 1898).

26. *State v. Castino*, 264 S.W.2d 372, 375 (Mo. 1954); *Crabtree v. Kurn*, 351 Mo. 628, 648, 173 S.W.2d 851, 859 (1943); *Woelfle v. Connecticut Mut. Life Ins. Co.*, 234 Mo. App. 135, 147-48, 112 S.W.2d 865, 872 (St. L. 1938); *Dauber v. Josephson*, 209 Mo. App. 531, 542, 237 S.W. 149, 153 (K.C. 1922).

27. *State v. Drummins*, 274 Mo. 632, 647, 204 S.W. 271, 276 (1918). *Accord*, cases cited note 26 *supra*.

28. *See Wells v. Goforth*, 443 S.W.2d 155 (Mo. En Banc 1969).

29. *Id.* at 159-60. The court gave no indication that the scope of impeachment would be widened by that decision and by implication limited such impeachment to a showing of the witness' prior inconsistent statements.

trapment" exception is for the consideration of the trial judge.³⁰ Thus, the trial judge has a certain amount of latitude to be lenient toward the calling party so as to allow him to impeach his own witness in such a case. There also has been dictum in appellate decisions to the effect that the requirements of surprise and affirmative damage should be less stringently applied if a party has been compelled, by law or by practical circumstances, to call the witness whose testimony the party wishes to impeach.³¹ Even where entrapment cannot be proved and prior inconsistent statements by the witness cannot be shown under this exception, the party can lessen any damage done by the testimony of his witness through the device of refreshing the witness' memory.³² The prior inconsistent statement will not come into evidence by this means, but the witness may decide to change his testimony when confronted with his prior inconsistent statement, obviating the need for direct impeachment.³³

The Missouri Supreme Court in the *Zabol* decision held that a party bearing the burden of proof on an issue is bound by the uncontradicted testimony of his own witness, and that that party is not entitled to have the jury disregard his only direct evidence on that issue and find the facts contrary to such evidence.³⁴ Legal scholars long ago abandoned the idea that a party should be literally bound by what his own witness says.³⁵ Missouri courts have adopted this view in holding that a party may introduce extrinsic evidence directly contradicting the testimony of his own witness.³⁶ However, the rule against impeachment of one's own witness is still very much in force in Missouri, and to the extent that the calling party fails to adduce evidence competent to contradict the testimony of his own witness,

30. *State v. Castino*, 264 S.W.2d 372, 375 (Mo. 1954); *Mooney v. Terminal Ry. Ass'n*, 352 Mo. 245, 260, 176 S.W.2d 605, 611 (1944); *Crabtree v. Kurn*, 351 Mo. 628, 648, 173 S.W.2d 851, 859 (1943); *Dauber v. Josephson*, 209 Mo. App. 531, 542, 237 S.W. 149, 153 (K.C. 1922); *Detjen v. Moerschel Brewing Co.*, 157 Mo. App. 614, 617, 138 S.W. 696, 697 (K.C. 1911).

31. *State v. Castino*, 264 S.W.2d 372, 375 (Mo. 1954); *Mooney v. Terminal Ry. Ass'n*, 352 Mo. 245, 260, 138 S.W. 605, 611 (1944).

32. *State v. Gregory*, 339 Mo. 133, 144, 96 S.W.2d 47, 51 (1936).

33. For a complete discussion of the problem of direct impeachment as well as the use of this tactic to overcome unexpected and damaging testimony, see Thomas, *supra* note 12, at 376. Even if the court allows impeachment, the prior inconsistent statement may not be used affirmatively to satisfy the proponent's burden of proof where the witness is not a party. If, however, the witness changes his testimony, the changed testimony will of course be substantive evidence. Where the witness is the adverse party and the prior inconsistent statement is an admission it can come in as substantive evidence as well. *Wells v. Goforth*, 443 S.W.2d 155, 160 (Mo. En Banc 1969); *Pulitzer v. Chapman*, 337 Mo. 298, 319, 85 S.W.2d 400, 410 (En Banc 1935).

34. 555 S.W.2d at 305.

35. 3A J. WIGMORE, *supra* note 10, § 897.

36. See generally cases cited note 4 *supra*.

he may be deemed to be "bound by" that testimony.³⁷ The problem with the use of this "bound by" terminology lies in the variety of meanings such ambiguous language can convey.

In the context of the *Zabol* case, either of two meanings can be inferred from the use by the court of the term "bound by." First, the court may have intended to rule only on the sufficiency of the evidence produced by the plaintiff on the issue of the procuring cause of the sale. Quoting a portion of the decision in *Draper v. Louisville & Nashville Railroad*,³⁸ the court explained the rule applied in the *Zabol* case as follows:

[S]ince a plaintiff has the burden of proof, if he puts on only one witness to prove a fact and his positive statement on direct testimony is that the fact is definitely one way, then the plaintiff cannot have the jury disregard his only direct evidence on the point and find that the fact is exactly the opposite on the basis of inferences from circumstances also stated in the testimony of this same witness. This is not so much a matter of being bound by what his witness says as it is a failure of proof of an essential fact.³⁹

From this language it appears that the court held only that the plaintiff *Zabol* failed to adduce evidence from which a reasonable jury could infer that he was the procuring cause of the sale. Such a holding would be based not on the rule against impeachment of one's own witness, but purely on the sufficiency of the evidence produced by the party with the burden of proof. Rather than saying that the party was "bound by" the testimony of this witness, the court could have more clearly conveyed this meaning by saying that the plaintiff failed to adduce sufficient evidence to make a submissible case on this issue. The court did arrive at this conclusion, but indicated that the result was due to the fact that the plaintiff was "bound by" the testimony of his own witness,⁴⁰ rather than directly addressing the issue of sufficiency of the evidence.

If the court had ruled that the plaintiff in *Zabol* merely failed to adduce sufficient evidence to make out a submissible case, it could have avoided resort to the rule against direct impeachment of one's own witness. Such an approach would be consistent with the general trend in the United States to discredit and abandon that rule.⁴¹

37. *Draper v. Louisville & N.R.R.*, 348 Mo. 886, 898, 156 S.W.2d 626, 633 (1941); *Rodan v. St. Louis Transit Co.*, 207 Mo. 392, 408, 105 S.W. 1061, 1066 (1907).

38. 348 Mo. 886, 156 S.W.2d 626 (1941).

39. 555 S.W.2d 299, 304.

40. *Id.* at 305.

41. See, e.g., FED. R. EVID. 607; UNIFORM RULE OF EVIDENCE 20; 3A J. WIGMORE, *supra* note 10, §§ 896-918; C. MCCORMICK, *supra* note 3, § 38; Ladd, *Impeachment of One's Own Witness—New Developments*, 4 U. CHI. L. REV. 69 (1936); Thomas, *supra* note 3. These sources assail the rule against impeachment of one's own witness on the basis that it is based on false premises and should be abandoned. Complete judicial rejection of the rule in the federal courts is found in *United States v. Freeman*, 302 F.2d 347 (2d Cir. 1962).

One could argue that the Missouri Supreme Court was moving toward an acceptance of this trend to disfavor the rule against impeachment of one's own witness, were it not for language in *Zabol* contrary to the notion that the court intended to deal with the issue of sufficiency of the evidence without resort to the rule against impeachment of one's own witness. The court stated that it was required to analyze the evidence presented by the plaintiff to determine whether a submissible case was made on the issue of the procuring cause, with regard to "certain rules which govern our consideration of the testimony introduced."⁴² The court then proceeded to quote from *Draper* the classic statement of the rule against impeachment of one's own witness.⁴³ From this language it appears that the court passed upon the sufficiency of the evidence on the issue of procuring cause taking into account the rule against impeachment of one's own witness. There may have been sufficient evidence in the deposition from which a reasonable jury could infer that the plaintiff was the procuring cause of the sale. However, the rule against impeachment of one's own witness as stated in *Draper* precluded jury consideration of that evidence;⁴⁴ the *circumstantial* evidence contained in the deposition that supported the plaintiff's theory could not be considered by the jury to contradict the *direct testimony* of that witness.⁴⁵

Under this reading of *Zabol*, failure to make out a submissible case follows from application of the rule against impeachment of one's own witness. The court could have conveyed this ruling without ambiguity by simply stating that the adverse testimony of this witness was conclusive as to the plaintiff because he failed to present evidence to contradict the direct testimony of his own witness and was precluded from asking the jury to disbelieve the only direct evidence presented on the issue by reason of the rule against direct impeachment of his own witness.

If this second interpretation of *Zabol* is accepted, application of the rule against impeachment of one's own witness may carry with it further implications. Although not expressly stated, the court may have applied the rule against impeachment of one's own witness more strictly where a disposition was introduced into evidence than where a live witness would be called upon to testify. The supreme court has by implication rejected the theory that the calling party vouches for the credibility of his own witnesses.⁴⁶ In those cases, the true reason recited for the rule against impeachment of one's own witness was to prevent the proponent from having the means to coerce favorable testimony from his own witness.⁴⁷ However,

42. 555 S.W.2d at 304.

43. *Id.*

44. *Id.* at 305.

45. *Id.* at 304.

46. *See* cases cited note 19 *supra*.

47. *See* cases cited note 19 *supra*.

because a party has full knowledge of the contents of a deposition, and there is obviously no danger of coercing favorable testimony from the deposition, the court may be retreating to the theory that a party vouches for or guarantees the credibility of all of the testimony contained in a deposition which that party introduces into evidence.⁴⁸

It follows from this reasoning that a more stringent binding effect could be applied to direct testimony brought before the court by means of a deposition. Something beyond circumstantial evidence will be required to contradict the direct testimony of the deponent and be deemed sufficient for jury consideration on that issue. Indeed, in *Zabol* there were facts in the deposition from which a jury drew an inference that Zabol was the procuring cause of the sale.⁴⁹ The Missouri Supreme Court held, however, that Zabol was "bound by" the direct testimony of the deponent and that the jury should not have been allowed to consider those facts as evidence.⁵⁰ This can be interpreted as the equivalent of saying that the calling party is bound absolutely; not only can he not impeach the testimony contained in the deposition, but he also cannot contradict that testimony with contrary facts that are brought out only in the deposition. If such contradictory facts were brought out in the testimony of a live witness, they would ordinarily be deemed proper for consideration by the jury because they bear on the believability of the witness. The basic facts concerning the negotiations would be weighed against the witness' conclusion that Zabol's efforts were not the procuring cause of the sale, the question of the procuring cause being a factual issue.

From this last reading of the *Zabol* case, the conclusion could be drawn that the Missouri Supreme Court has arrived at a tripartite application of the rule against impeachment of one's own witness. At the most liberal end of this spectrum would be the situation in which a party calls his opponent to the witness stand.⁵¹ In such a situation, the adverse party does become the calling party's own witness under the rule against direct impeachment of one's own witness.⁵² Under *Wells v. Goforth*⁵³, however, the calling party can impeach the adverse party by showing any prior inconsistent

48. The court in *Zabol* cited *Barnum v. Hutchens Metal Prod., Inc.*, 255 S.W.2d 807 (Mo. 1953), in support of the proposition that the calling party is bound by the testimony of his own witness to the extent that it is not contradicted by other evidence. However, the court in *Barnum* relied on the "vouching for" rationale as the reason for application of the rule. *Id.* at 809. Given the fact that the court in *Zabol* advanced no theory upon which to base the application of the rule and the fact that it cited *Barnum*, it could be inferred that the court applied the "vouching for" rationale by implication.

49. 555 S.W.2d at 300.

50. *Id.* at 305.

51. See RSMo § 491.030 (1969), which provides that any party to a civil action may compel any adverse party to testify as a witness in his behalf.

52. See *Wells v. Goforth*, 443 S.W.2d 155, 159 (Mo. En Banc 1969).

53. *Id.*

statements made by the adverse party concerning the facts in question.⁵⁴ This liberalization does not go as far as it would appear, because such a prior inconsistent statement would be independently admissible under the admissions of a party exception to the hearsay rule.⁵⁵

The second level of the rule against direct impeachment of one's own witness would deal with the situation in which a party calls a third person to the stand as a live witness. In such a case the general rule would apply. Impeachment, other than by direct contradiction of the witness' testimony, would be allowed only if the calling party could show surprise⁵⁶ and affirmative damage⁵⁷ so as to come under the entrapment exception. If entrapment is established, the party may impeach his own witness by showing any prior inconsistent statements made by that witness concerning the facts in question.⁵⁸ In recent years there has been a trend to liberalize the application of this rule,⁵⁹ and the calling party can always introduce extrinsic evidence to contradict the testimony of his own witness, be he the adverse party or merely a third party witness.⁶⁰

Finally, the Missouri Supreme Court in *Zabol* may have enunciated a third level of the rule against impeachment of one's own witness. This strictest application of the rule would apply to cases wherein the party introduces a deposition rather than calling the deponent as a live witness. Because there is no uncertainty as to what a deposition will say once introduced into evidence, there is no reason ever to allow the calling party to impeach the testimony contained therein, and the party will not be allowed to ask the jury to draw inferences based only on circumstances brought out in the deposition that are contrary to the otherwise uncontradicted testimony of the deponent.⁶¹ The offering party will be deemed to vouch for the credibility of the testimony contained in the deposition and should be bound thereby absent other competent evidence to the contrary adduced by the calling party.⁶² It is not clear which meaning the Missouri Supreme Court intended to convey in the *Zabol* decision. In view of the general trend to liberalize the rule against impeachment of one's own witness,⁶³ it would seem to be desirable for the Missouri courts to follow suit. The first interpretation of this decision, *i.e.*, that the court was ruling only on the sufficiency of the evidence presented by the plaintiff, is consistent with this trend. However, the more likely interpretation is that the

54. *Id.* at 160.

55. See C. MCCORMICK, *supra* note 3, § 262.

56. See text accompanying notes 22-25 *supra*.

57. See text accompanying notes 26-27 *supra*.

58. *Dunn v. Dunnaker*, 87 Mo. 597, 600 (1885).

59. See text accompanying notes 30-33 *supra*.

60. See cases cited note 4 *supra*.

61. 555 S.W.2d at 304-05.

62. *Id.* at 306, quoting *Barnum v. Hutchens Metal Products, Inc.*, 255

63. See authorities cited note 41 *supra*.